STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois, Petitioner	)	
	)	Docket No. 12-0244
Smart Grid Advanced Metering Infrastructure Deployment Plan.	)	

MOTION OF AMEREN ILLINOIS COMPANY
TO STRIKE SECTION III OF
OFFICE OF THE ATTORNEY GENERAL'S INITIAL BRIEF

Pursuant to 83 Ill. Adm. Code § 200.190, Ameren Illinois Company d/b/a Ameren Illinois (AIC) respectfully moves for issuance of an order striking Section III (pp. 22-25) of the Initial Brief of the Office of the Attorney General (AG). This motion should be granted because Section III of AG's brief proposes modifications to AIC's AMI Plan that (a) were not disclosed in direct testimony (or any testimony) and (b) raise issues that are beyond the scope of rehearing. That similar modifications were adopted in the Commonwealth Edison (ComEd) AMI proceeding is insufficient reason to adopt them here. Section III of the AG's Initial Brief should be stricken and the modifications proposed therein given no weight.

I. BACKGROUND

In the AG's direct testimony on rehearing, Mr. J. Richard Hornby proposed that, if the Commission decided to approve AIC's AMI Plan presented on rehearing, the Commission should "require the Company to adopt the same metrics and stakeholder outreach as the Commission ordered in the Commonwealth Edison AMI proceeding, as well as the same reporting requirements." (AG Ex. 1.0RH, pp. 5, 31.) This solitary bulleted point (repeated twice) was the entirety of the AG's recommendation in testimony. No explanation was offered as to why the Commission should require AIC to adopt proposals put forth in a different proceeding.

No evidence was presented (let alone admitted into the record) to support the imposition of these proposals on AIC. AG did not even bother to identify what the "metrics" were, what the "stakeholder outreach" was supposed to be, or what "reporting requirements" were being proposed.

Because the AG's recommendations were unknown, AIC did not have the opportunity to respond to the relevance or merit of the recommendations in its rebuttal testimony. (Ameren Ex. 8.0RH, p. 38.) This is in stark contrast to proposals offered by other Intervenors to this proceeding, Comverge, Inc. and the Citizens Utility Board (CUB) and the Environmental Law and Policy Center (ELPC). Both Comverge and CUB-ELPC submitted detailed direct testimony on the additional tracking measures that they would like to see in the AMI Plan. (See, e.g., Comverge Ex. 1.0RH, pp. 9-10; CUB Exs. 2.0RH, pp. 24-31; 3.0RH, pp. 8-18.) AIC may not agree with the merits or timing of these other Intervenor proposals, but that is irrelevant. The point is that Comverge and CUB-ELPC fully explained their proposals in testimony, which gave AIC the opportunity to respond to the merits of those proposals in its rebuttal testimony. (See Ameren Exs. 8.0RH, pp. 7-32; 11.0RH.) The AG did not afford AIC the same opportunity. Nor did it seek to question AIC witnesses at hearing about the merits of the AG's proposals.

Now, for the first time in brief, the AG finally has made explicit its recommendation. Section III of its Initial Brief on Rehearing (pp. 22-25) spells out the particulars of the AG's proposals. The AG explains that the proposals it wants included in the Plan concern Illinois's "vulnerable populations." The Initial Brief also purports to identify the reasons why the Commission should adopt its proposals: the "need for consistency" between the different formula rate dockets and the bald assertion that the Plan "placed all of the investment risk on ratepayers." (AG Br., pp. 24, 25.) These newly proposed modifications to the Plan, the AG claims, will "help

ensure that assumed customer benefits are realized and no harm comes to Ameren customers." (Id., p. 22.) This level of detail and these explanations were not set forth in the AG's or any other party's direct testimony.

II. ARGUMENT

The Commission's granting of rehearing is not an open invitation for parties to offer up a laundry list of items that it would like the Commission to order. There must be some nexus to the issue on which rehearing was sought. Similarly, the fact that parties have the opportunity to file post-hearing briefs in docketed Commission proceedings does not mean that the brief can advocate whatever they want. There must be some nexus to the evidence presented in the record. The AG's attempt to offer late-filed modifications to the Plan in this rehearing proceeding fails both tests. It is not appropriate for the Commission to consider the AG's proposed modifications to the Plan in the scope of this rehearing proceeding. Nor it is appropriate for the Commission to consider modifications to the Plan that are first explained in post-hearing briefing. The rights afforded litigants require adherence to "the rules of the game." There are procedural limitations to what issues can be heard during rehearing, just like there are procedural limitations on when a party can present evidence and claims in any proceeding. Accordingly, the Commission should prevent the AG from flouting those rules and infringing AIC's rights without consequence.

A. The AG's Modifications to the AMI Plan Are Beyond the Scope of this Rehearing Proceeding.

The scope of rehearing is limited to the issues for which rehearing is sought and granted. See, e.g., Citizens Util. Bd., Dockets 00-0620/0621 (Cons.), Order on Rehearing, 2002 Ill. PUC LEXIS 16, *1-2 (Jan. 3, 2002) (limiting scope of rehearing to three specific issues raised in utility's petition); Verizon North Inc., Dockets 00-0511/0512 (Cons.), Order on Rehearing, 2001 Ill. PUC LEXIS 1039, *3-4, 11 (Nov. 29, 2001) (limiting scope of rehearing to two issues based

on utility's petition); Illinois Bell Tele. Co., Order on Rehearing, Docket 00-0393, 2002 Ill. PUC LEXIS 362, *186 (Mar. 28, 2002) (finding issues not enumerated in rehearing order beyond the scope of rehearing); Commonwealth Edison Co., Docket 99-0117, Order on Rehearing, 2000 Ill. PUC LEXIS 291, *1-2, 36 (Mar. 9, 2000) (identifying issues for rehearing and finding Staff and intervenor proposal beyond the scope); see also 83 Ill. Adm. Code § 200.880(b) ("Applications for rehearing must state with specificity the issues for which rehearing is sought.").

The Commission's May 29, 2012 Final Order found that AIC's original AMI Plan did not meet one statutory requirement, the cost-beneficial requirement. AIC sought rehearing of the May 29, 2012 Order on that one statutory requirement. The AG could have sought rehearing on other issues, such as whether the Plan contains sufficient "metrics," "consumer outreach" and "reporting" requirements. It did not. It didn't even make these proposals in the underlying proceeding. Rehearing is not the appropriate forum for re-litigating that statutory requirement, absent the Commission actually granting rehearing on that issue. See 220 ILCS 5/10-113(a) ("No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for a rehearing before the Commission.").

B. The AG's Modifications to the AMI Plan Are Offered Too Late After the Evidentiary Hearing and the Record Has Been Marked Heard and Taken.

Due process in administrative proceedings requires "the opportunity to be heard" and "the right to cross-examine adverse witnesses." Gigger v. Bd. of Fire & Police Comm'rs of City of East St. Louis, 23 Ill. App. 2d 433, 439 (4th Dist 1959); see also Abrahamson v. Ill. Dep't of Prof'l Reg., 153 Ill. 2d 76, 95 (1992); Balmoral Racing Club, Inc. v. Ill. Racing Bd., 151 Ill. 2d 367, 400-01 (1992) ("cross-examination is required in order to ensure that due process requirements are met"). The Commission consistently has found that consideration of evidence, without allowing an opposing party the opportunity to cross-examine or respond, contravenes

due process. See, e.g., Illinois Commerce Comm'n v. Ill. Gas Co., Docket 02-0170, Order, 2003 Ill. PUC LEXIS 682, *35-36 (Aug. 6, 2003) (no consideration given to expert qualifications submitted for the first time in reply brief on exceptions); Illinois Bell Tel. Co., Docket 00-0260, Order, 2001 Ill. PUC LEXIS 871, *20-21 (Sept. 12, 2001) (auditor's participation in proceeding critical to afford parties opportunity to present and cross-examine witnesses relative to the issue of tracking merger related costs in order for due process concerns to be satisfied); Commonwealth Edison Co., Docket 92-0121, Order, 1995 Ill. PUC LEXIS 232, *25-26 (Apr. 12, 1995) (no consideration given to proposal offered after evidentiary hearing concluded without benefit of fundamental right to cross-examination by the other parties); Illinois Commerce Comm'n, Docket 94-0066, Order, 1995 Ill. PUC LEXIS 176, *266-68 (Feb. 23, 1995) (late introduction of Staff's new modifications proposed for the first time in brief, which were not tested in cross-examination and which no party had the opportunity to address for the record, would violate fundamental fairness and abridge other parties' due process).

Parties practicing before the Commission must be given the opportunity to cross-examine adverse witnesses and submit evidence in rebuttal to their claims. That cannot happen if the Commission permits parties to wait until after the record is closed to unveil new positions or buttress vague assertions with new evidence. This is not to say that parties must testify on legal arguments. But parties must give notice of expert opinions and recommendations and present them through witness testimony or other evidence before the record is closed. Conjecture of counsel in a brief is no substitute for the timely disclosure of substantive proposals. The right to confront witnesses in the hearing room is a fundamental right of any litigant. This is precisely why the Commission has rounds of prefiled testimony: to disclose positions and allow parties to respond.

The administrative rules that govern proceedings before the Commission exist for a reason: they ensure that parties who are subject to the Commission's jurisdiction receive fair and impartial treatment. Complaints and motions must identify the specific relief sought. Discovery allows for the full disclosure of all relevant and material facts. Parties are entitled to an opportunity to be heard at hearing and present evidence. Witnesses are required to swear or affirm their testimony and be available for cross-examination. This process helps to ensure the due process rights of the petitioner are not violated. That process, however, breaks down once parties are able to mutely participate in a Commission proceeding and then unveil brand new positions in post-hearing briefs. The nature of litigation is for one to fully present his or her case and have the opportunity to fully challenge the other's case, both before and during the hearing, and not just after. That did not happen here. It is fundamentally unfair for any party to propose a modification to the Plan now on brief without presenting that recommendation through a witness in testimony. AIC had the right to test and debunk the merits of any recommendation through rebuttal testimony and a hearing before the record was closed. The withholding of detailed Plan modifications until brief and the failure to have a witness present those details prevented the exercise of that right.

III. CONCLUSION

Accordingly, the Commission should strike Section III of the AG's Initial Brief (pp. 22-25) from the record and should give the modifications proposed therein no weight in its final order on rehearing in this docket.

DATED: October 4, 2012

Respectfully submitted,

AMEREN ILLINOIS COMPANY

By: */s/ Mark A. Whitt*

One of their attorneys

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CERTIFICATE OF SERVICE

I, Mark A. Whitt, certify that on October 4, 2012, I caused to be served a copy of the foregoing *Motion of Ameren Illinois Company To Strike Section III of Office of the Attorney General's Initial Brief* by electronic mail to the individuals on the Commission's Service List for Docket No. 12-0244.

/s/ Mark A. Whitt
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